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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)	MM Docket No. 97-128
)	
Martin W. Hoffman, Trustee-in-Bankruptcy)	File No. BRCT-881201LG
for Astroline Communications Company)	
Limited Partnership)	
)	
For Renewal of License of)	
Station WHCT-TV, Hartford, Connecticut)	
)	
and)	
)	
Shurberg Broadcasting of Hartford)	File No. BPCT-831202KF
)	
For Construction Permit for a New)	
Television Station to Operate on)	
Channel 18, Hartford, Connecticut)	
)	
To: The Honorable John M. Frysiak		
Administrative Law Judge		

MASS MEDIA BUREAU'S REPLY TO
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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SUMMARY

At issue in this case is whether or not Astroline Communications Company Limited Partnership ("ACCLP") made misrepresentations to the Commission and the federal courts concerning its status as a minority controlled entity. The Bureau concluded in its PFCs that the record does not support a finding of misrepresentation.

Shurberg argues that ACCLP misrepresented Ramirez' ownership interest in ACCLP and his control over Station WHCT-TV. In support of its position, it points to (1) Ramirez' small capital contribution to the partnership; (2) ACCLP's profit and loss reallocation; (3) the lack of insulation of the limited partners; and (4) the involvement of the limited partners in station affairs. However, the cases Shurberg cites in support of its conclusions do not involve the Commission's minority distress sale policy and can be distinguished from this case. Moreover, the issue in this case is solely whether or not ACCLP misrepresented its ownership structure or Ramirez' control of Station WHCT-TV. By definition, misrepresentation is a false statement of fact made with an intent to deceive. The record lacks evidence that ACCLP was concerned with its status as an entity that acquired a station pursuant to the Commission's minority distress sale and there is no evidence of any intent to deceive the Commission in this regard.

Trustee/Ramirez/TIBS, like the Bureau, conclude that ACCLP did not engage in misrepresentation. They then go on to argue that the Presiding Judge must accord "full faith and credit" to the bankruptcy decisions and that collateral estoppel bars litigation of the designated issues. It is true that the Presiding Judge may not rule in a way that ignores or alters the bankruptcy decisions. However, the issues in this case differ from those litigated by the bankruptcy and appellate courts and were appropriately designated.

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**MASS MEDIA BUREAU'S
REPLY TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. Preliminary Statement

1. At issue in this case is whether or not Astroline Communications Company Limited Partnership ("ACCLP") made misrepresentations to the Commission and the federal courts concerning its status as a minority controlled entity. Based upon the evidence adduced under that issue, the Presiding Judge is to determine whether or not the public interest, convenience and necessity would be served by grant of the pending application for renewal of license of Station WHCT-TV, Channel 18, Hartford, Connecticut.

2. On December 8, 1998, Alan Shurberg d/b/a Shurberg Broadcasting of Hartford ("Shurberg") filed Proposed Findings of Fact and Conclusions of Law in this proceeding ("Shurberg PFCs"). Also on that date, Martin R. Hoffman, Trustee-in-Bankruptcy (the "Trustee"), Richard P. Ramirez ("Ramirez"), and Two If By Sea Broadcasting Corporation ("TIBS") (collectively referred to as "Trustee/Ramirez/TIBS") filed Joint Proposed Findings of Fact and Conclusions of Law ("Trustee/Ramirez/TIBS PFCs"). The Mass Media Bureau hereby replies to both PFCs. The Bureau's failure to reply to any particular finding or conclusion contained in the other parties' PFCs should not be construed as a concession to its accuracy or completeness. The Bureau submits that its own proposed findings of fact are an accurate and complete presentation of the relevant record evidence and that its conclusions of law properly apply Commission precedent to the facts of this proceeding.

II. Reply to Shurberg PFCs

3. Shurberg claims that ACCLP was not a bona fide minority owned and minority controlled limited partnership. Moreover, it claims that ACCLP failed to satisfy the Commission's minority distress sale policy because Ramirez, its ethnic minority general partner, owned less than a 21% interest in ACCLP and because Ramirez was not in control of Station WHCT-TV. In support of its position, Shurberg points to (1) Ramirez' small capital contribution to the partnership; (2) the profit and loss reallocation set forth in ACCLP's Amended and Restated Partnership Agreement, effective December 31, 1985 (the "Amended and Restated Agreement"); (3) the lack of insulation of the limited partners; and (4) the involvement of the limited partners in station affairs. Shurberg concludes that, given these factors, ACCLP misrepresented Ramirez' ownership interest in ACCLP and his control of Station WHCT-TV. Finally, it argues that ACCLP intentionally withheld information from the Commission in this regard. As set forth below, Shurberg's conclusions in this regard are not supported by the record or by case precedent.

4. Capital Contributions. Citing to Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, 103 FCC 2d 511 (1985) ("Citizenship Requirements"), recon. granted in part and denied in part, 1 FCC Rcd 12 (1986) ("Citizenship Requirements Reconsideration"), Shurberg claims that Ramirez' equity interest in ACCLP should be calculated on the basis of his capital contribution to the partnership. Shurberg PFCs at 94-98. Specifically, Shurberg alleges that the Commission held that "ownership of limited partnerships would be calculated based on the actual cash contributions made to the partnership by the partners" and that "sweat equity"

would not be considered as a measure of ownership. Shurberg PFCs at 94. While Shurberg admits that this ruling was not published until June 1985, it claims that "ACCLP cannot legitimately claim that Ramirez 'owned' more than 20% of ACCLP after mid-1985." Shurberg PFCs at 96.

5. Shurberg's citation of Citizenship Requirements is misplaced. That ruling defined limited partnership interests only for the purpose of the alien ownership restrictions set out in Section 310(b) of the Communications Act of 1934, as amended (the "Communications Act"). The Commission has not extended the definition of ownership contained therein to apply in a minority distress sale context. Further, contrary to Shurberg's contention, the Commission has not, even in an alien ownership analysis, completely rejected the measurement of ownership by sweat equity. Rather, the Commission has specifically recognized that there may be other ways to measure limited partnership ownership interests, including consideration of sweat equity. Citizenship Requirements Reconsideration, 1 FCC Rcd at 14. See Fox Television Stations, Inc., 10 FCC Rcd 8452, 8474 (1995), aff'd, 11 FCC Rcd 7773 (1996) (equity capital contributions may not fairly measure the true extent of an ownership interest, including sweat equity).¹

6. Moreover, at issue in this proceeding is not whether or not Ramirez had a 21% equity interest in ACCLP, but whether or not ACCLP engaged in misrepresentation when it reported to the Commission and the federal courts that Ramirez had such an interest. A misrepresentation is a material false statement of fact made with an intent to deceive the

¹ See also Mabelton Broadcasting Company, Inc., 5 FCC Rcd 6314, 6317 (Rev. Bd. 1990) (the lack of financial contribution by a general partner is not, by itself, a determining factor as to the bona fides of an ownership structure).

Commission. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). See also Roy M. Speer, 11 FCC Rcd 18393, 18421 (1996) ("misrepresentation is characterized by making a material false statement to the Commission"). Shurberg would have us believe that ACCLP represented that Ramirez held a 21% ownership interest, even though it could not validly have claimed such an interest following the release of Citizenship Requirements of Section 310, and that it knew its representations were false. However, as discussed above, case precedent does not support a finding that ACCLP's representations were false. Moreover, there is no evidence in the record that ACCLP was aware of the Commission's ruling in Citizenship Requirements of Licensees or that it ever contemplated the possible impact of that ruling upon its representations to the Commission and the courts. Thus, there is no evidence of any intent to deceive the Commission in this regard. Shurberg argues that the fact that ACCLP did not disclose the additional capital contributions of the limited partners is evidence of its intent to deceive. But that is mere speculation unsupported by the record. Before a licensee may be found to have withheld information, it must be shown that the licensee "knew that the information was relevant and intended to withhold it." Fox Television Stations, Inc., 10 FCC Rcd at 8478, citing Abacus Broadcasting Corp., 8 FCC Rcd 5110, 5112 (Rev. Bd. 1993).

7. Reallocation of Profits and Losses. Shurberg contends that Ramirez could not have claimed legitimately to own 21% of ACCLP after ACCLP's reallocation of profits and losses in its Amended and Restated Agreement. Shurberg argues that pursuant to ACCLP's Amended and Restated Agreement, Ramirez was accorded less than 1% of ACCLP's profits, losses and distributions until ACCLP's limited partners recouped their capital contributions. Citing Pacific Television, Inc., 2 FCC Rcd 1101 (Rev. Bd. 1987), Shurberg alleges that such

a reallocation of profits and losses entitles Ramirez to only a 1% or less equity interest in the partnership. Shurberg PFCs at 99-101.

8. In the Pacific Television, Inc. case, a limited partner applicant represented that the general partner had a 20% equity interest in the partnership, notwithstanding the fact that the general partner's interest was subordinated until full payout of a limited partner's capital contribution. While the administrative law judge found that such a subordination clause impacted the applicant's comparative standing and integration credit, he specifically held that the existence of such a clause did not render the applicant's representations as to its ownership structure false. Pacific Television, Inc. Initial Decision, FCC 86D-43, para. 78, released July 2, 1986 (unpublished). The administrative law judge concluded that the applicant had not misrepresented its ownership. The Review Board affirmed the initial decision.² Accordingly, contrary to Shurberg's assertions, Pacific Television, Inc. does not hold that the existence of a subordination clause negates a general partner's interest in the partnership. While such a clause may effect an applicant's integration credit in a comparative proceeding, this is not a comparative proceeding involving an integration claim.³

² Although the Review Board did question whether or not the failure to timely inform the Commission of the subordination agreement constituted lack of candor, it did not overturn the administrative law judge's ruling that the applicant had not misrepresented its ownership structure. Moreover, the Review Board determined that a ruling on lack of candor would depend upon a more in depth review of the circumstances of that case. 2 FCC Rcd at 1103.

³ The Bureau likewise does not find the three other cases cited by Shurberg in this context to be controlling. Shurberg PFCs at 101-02, citing Praise Broadcasting Network, Inc., 8 FCC Rcd 5457, 5459 (Rev. Bd. 1993); Saltaire Communications, Inc., 8 FCC Rcd 6284 (1993); Atlantic City Community Broadcasting, Inc., 8 FCC Rcd 4520, 4521 (1993). Like Pacific Television, Inc., all three of those cases concern integration credit in a comparative proceeding. Moreover, all three cases were released in 1993, well after any of the statements made by ACCLP which are at issue in this proceeding and ACCLP cannot be said to have had knowledge of the case law contained therein at the time it made its

9. Shurberg seems to argue that ACCLP intentionally did not file the Amended and Restated Agreement because of a concern that the profit and loss reallocation in that agreement negated its representations regarding Ramirez' ownership interest in ACCLP.⁴ Shurberg's conclusions in this regard are unsubstantiated by the record. Although there is evidence that the partnership was concerned as to how Shurberg itself would react to an amendment of the partnership agreement (Shurberg Ex. 37, p. 4, and Ex. 39, p. 7), there is nothing in the record to indicate that the partnership believed the agreement deviated from ACCLP's representations in connection with the minority distress sale policy. Moreover, both Ramirez and Hart testified at hearing that there was no conscious decision not to report the reallocation or file the Amended and Restated Agreement. MMB PFCs at 23 and 32; Tr. 331-36, 654-55.⁵ As discussed in paragraph 6 above, a licensee may not be held accountable for withholding information if it did not intend to withhold that information. Fox Television Stations, Inc., 10 FCC Rcd at 8478 (1995).

10. Insulation of Limited Partners. Shurberg claims that ACCLP was not an insulated limited partnership and, thus, Ramirez could not be credited with control of Station WHCT-TV. Citing to Corporate Ownership Reporting and Disclosure by Broadcast Licensees, 58 RR

representations.

⁴ The Commission's ownership files for Station WHCT-TV are incomplete (MMB PFCs at 10). Thus, although the record does not reveal that a copy of the Amended and Restated Agreement was ever filed with the Commission (MMB PFCs at 23), it cannot be conclusively determined that ACCLP did not file a copy of the agreement.

⁵ This testimony is credible, particularly in light of the fact that the Commission suspended the filing of annual ownership reports from 1985 until 1987. MMB PFCs at 24. Moreover, when ACCLP next filed a full ownership report, on December 7, 1988, it specifically referenced the Amended and Restated Agreement. Trustee/Ramirez/TIBS Ex. 2, Appendix D, p. 123; Trustee/Ramirez/TIBS PFCs at 50.

2d 604 (1985) ("Ownership Attribution Reconsideration"), Shurberg argues that in order to have "complete control" sufficient to satisfy the minority distress sale requirements, limited partners must be prohibited from having any material involvement in the partnership's day-to-day media activities and such prohibitions must be included in the partnership agreement. Shurberg PFCs at 103. Although Shurberg recognizes that the partnership was originally formed and the request for minority distress sale filed before the Commission's ruling in Ownership Attribution Reconsideration, it argues that ACCLP lost any claims of "grandfathering" when it amended its partnership agreement. Shurberg PFCs at 105.

11. Again, however, the issue in this case is misrepresentation. As Trustee/Ramirez/TIBs has consistently stated (Trustee/Ramirez/TIBS PFCs at 62 and 74), ACCLP never represented that it was an insulated limited partnership. Moreover, ACCLP cannot be accused of withholding that information from the Commission or the federal courts since, as even Shurberg conceded (Shurberg PFCs at 103), ACCLP's reported partnership structure was not in compliance with the insulation requirements. In effect, Shurberg is arguing that once ACCLP amended its partnership agreement it was obligated to report to the Commission and the courts that it was still a non-insulated limited partnership. This is absurd. ACCLP was a non-insulated limited partnership when it was formed in 1984 and remained a non-insulated limited partnership following the amendment to its partnership agreement in 1985.

12. Shurberg spends much time citing to documents which, it contends, demonstrate that ACCLP knew that as a non-insulated limited partnership it was not in compliance with the minority distress sale requirements. In particular, Shurberg suggests that ACCLP filed a

letter instead of an ownership report on August 3, 1987, because it did not want to respond to the question on the ownership report regarding limited partner insulation. Shurberg PFCs at 108-110. In addition, Shurberg points to language contained in correspondence from ACCLP's communications counsel to Ramirez regarding the need to amend ACCLP's partnership structure. Shurberg PFCs at 110-115.⁶

13. It is true that ACCLP eventually amended its structure to comply with the limited partnership insulation requirements.⁷ However, Ramirez specifically testified at hearing that while he was concerned about the insulation requirements, his concern arose because of the possibility of a comparative renewal hearing wherein integration credit would be considered, not because of a concern that ACCLP's status as an entity that acquired a station pursuant to the Commission's minority distress sale policy was in jeopardy. MMB PFCs at 26; Tr. 418. In light of Ramirez' clear testimony, Shurberg's speculation that ACCLP was in fact concerned with its representations in the minority distress sale context is without merit. Moreover, while ACCLP's letter of August 3, 1987, clearly did not answer all the questions contained in an ownership report, it did not misrepresent the information contained therein.

⁶ Shurberg contends that counsel's language in those documents is "self-serving" and "disingenuous." Shurberg PFCs at fns. 53, 55, and 57. However, even if that is true, it would not be unreasonable for Ramirez to rely on his own counsel's statements. See Fox Television Stations, Inc., 10 FCC Rcd at 8501 (not appropriate to find lack of candor where licensee reasonably and in good faith relied on counsel). Moreover, while counsel in this case had a 1% general partnership interest in the licensee, it was Ramirez, and not counsel, who approved and executed all documents regarding ownership and control of ACCLP.

⁷ Shurberg incorrectly states that ACCLP's application for consent to restructure (BTCCT-881122KH) was still pending as of July 1989. Shurberg PFCs at 90. However, the Commission's data base reflects grant of that application on December 22, 1988.

14. Control of Station WHCT-TV. Shurberg alleges that the limited partners' involvement with the station demonstrates that Ramirez was not in control of Station WHCT-TV. In particular, he focuses on the station's finances, arguing that the limited partners, and not Ramirez, were in control thereof. Shurberg PFCs at 53-57. However, as discussed in MMB's PFCs at 30-31, all station expenses were incurred at the direction of Ramirez or his staff and Ramirez could not recall any instance where his payment requests were denied. Moreover, Ramirez and his staff were solely responsible for preparing the station's budget and Ramirez never changed an operating budget to accommodate the limited partners. Thus, Ramirez reasonably believed that he was in control of the station and the record lacks evidence of any intent to deceive the Commission and federal courts in this regard. MMB PFCs at 31. Further, although the limited partners certainly were not insulated from station activities as the Commission has defined insulation, ACCLP never claimed the limited partners to be insulated and, accordingly, cannot be accused of misrepresentation in this regard.

15. Additionally, Shurberg makes erroneous findings with regard to Ramirez' control of the partnership. For example, Shurberg finds that Ramirez did not meet the limited partners until after ACCLP completed its negotiations for acquisition of the station. Shurberg PFCs at 17. The record is unclear in this regard as Ramirez could not recall the exact day he met the limited partners, only that it was over Memorial Day weekend. Tr. 221-22. More significantly, the exhibit Shurberg cites in support of its finding (Shurberg Ex. 35) was withdrawn and not entered into the record. Tr. 669. Also, Shurberg states that the "record does not indicate that Ramirez requested any changes to the draft" partnership agreement.

Shurberg PFCs at 20. This is wrong. Ramirez specifically testified that, upon his request, his attorney reviewed the agreement and that a "marked up" draft with suggested edits was sent to ACCLP's corporate counsel. Tr. 388-89; MMB PFCs at 7. Further, Shurberg characterizes Ramirez' deference to the limited partners as "consulting with them or seeking their approval" (Shurberg PFCs at 53) but, Ramirez specifically testified that, although he was deferential to the limited partners, he did not need or seek their approval regarding station operations. MMB PFCs at 11 and 29; Tr. 270.

16. Shurberg also improperly relies on Shurberg Exs. 134 and 135 to support its finding that the limited partners had to approve work by communications counsel for ACCLP. Shurberg PFCs at 67. ACCLP's communications counsel, Thomas Hart, testified that Shurberg Ex. 134 relates to work being done for Astroline Corporation, not ACCLP. Tr. 634. Accordingly, it cannot be used as evidence of control over ACCLP by the limited partners. Moreover, Hart testified that Shurberg Ex. 135 is inaccurate and that he did not advise the attorney who wrote that memo not to respond to Ramirez' calls. Tr. 637. In light of Hart's testimony, and in the absence of contradictory testimony, Shurberg Ex. 135 cannot be given any probative weight.

III. Reply to Trustee/Ramirez/TIBS PFCs

17. Trustee/Ramirez/TIBS gloss over the involvement of the ACCLP limited partners in the partnership's finances. Trustee/Ramirez/TIBS at 36-39 and 65-66. In particular, they fail to note that Ramirez did not have a checkbook at the station and that there was no local bank account. See MMB PFCs at 16-17. However, as discussed in paragraph 14 above, all

station expenses were incurred by Ramirez or his staff and Ramirez or his staff were solely responsible for preparing the station's budget. Thus, as set forth in the Bureau's PFCs, the record supports a finding that Ramirez reasonably believed he was in control of station finances and the Bureau agrees with Trustee/Ramirez/TIBS that ACCLP did not engage in misrepresentation in this regard. MMB PFCs at 31.

18. Citing Town of Deerfield, New York, 992 F.2d 420, 428 (2nd Cir. 1993), Trustee/Ramirez/TIBS argue that the FCC may not review or alter the decision of the bankruptcy court, or the rulings by the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit, affirming that decision. Thus, they argue, the Commission must accord "full faith and credit" to those rulings. Trustee/Ramirez/TIBS PFCs at 76-80. Specifically, they contend that although the legal issue is technically different, the factual predicate for Shurberg's allegations has already been rejected by the courts and may not be relitigated.

19. Trustee/Ramirez/TIBS also argue that the doctrine of collateral estoppel bars Shurberg from relitigating whether or not Ramirez was in control of ACCLP. Trustee/Ramirez/TIBS PFCs at 80-83. As Trustee/Ramirez/TIBS state, collateral estoppel, or issue preclusion, prevents a party from attempting to relitigate an issue which was settled in a previous adjudication. The Commission has ruled that prior adjudication of an issue is binding if (1) the identical issue was previously litigated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action. Trustee/Ramirez/TIBS at 81-82, citing West Samoa, Inc., 13 FCC Rcd 6342, 6346 (1998).

Trustee/Ramirez/TIBS argue that all four criteria have been met and that Shurberg may not now relitigate issues which were resolved in the bankruptcy decisions.

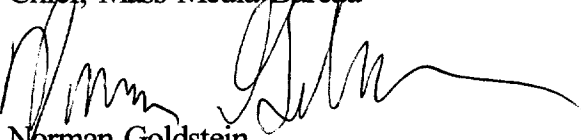
20. The bankruptcy decisions are part of the record in this proceeding (Trustee/Ramirez/TIBS Ex. 3) and should be considered by the Presiding Judge. In addition, the Presiding Judge may not rule in a way that ignores or alters those decisions. However, as the Presiding Judge concluded in his Memorandum Opinion and Order, FCC 97M-140, para. 10, released August 21, 1997, the bankruptcy decisions did not address or resolve all relevant matters regarding compliance with the Commission's minority distress sale policy and possible misrepresentations in that regard. Thus, the Bureau does not agree with Trustee/Ramirez/TIBS' argument that the doctrine of collateral estoppel bars litigation of the issues in this case.

21. Finally, Trustee/Ramirez/TIBS argue that the Commission cannot undo a grant which became final six years earlier. Trustee/Ramirez/TIBS PFCs at 83-85. This is a nonsensical argument that need not be addressed. At issue in this case is whether or not WHCT-TV's renewal application should be granted and, as set forth in the Bureau's PFCs, the Bureau believes that it should.

IV. Ultimate Conclusions

22. At issue in this case is whether or not ACCLP made misrepresentations to the Commission and the federal courts concerning its status as a minority controlled entity. As the Bureau concluded in its PFCs, the record does not support a finding of misrepresentation. Accordingly, the Bureau recommends grant of the above-captioned application for renewal of license of Station WHCT-TV, Hartford, Connecticut.


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January 8, 1999

CERTIFICATE OF SERVICE

I, Talya Lewis, a secretary in the Complaints and Political Programming Branch, Mass Media Bureau, hereby certifies that she has on this 8th day of January, 1999, sent by regular first class U.S. mail, copies of the foregoing "Mass Media Bureau's Proposed Findings of Fact and Conclusions of Law" to:

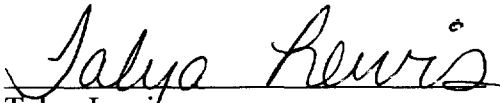
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